

Multi-Option ADR Project
FAMILY LAW ADR PROGRAM

*Domestic Violence Protocol
and Screening Guidelines*

2004

Multi-Option ADR Project
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I. Summary/Guiding Principles

- A. This Protocol shall serve as a guide for the conduct of mediations that are referred through the Family Law ADR Program (the "Program") of the Multi-Option ADR Project (MAP). The Program has created this protocol with an understanding that not all cases are suitable or appropriate for mediation. ~~There is a duty to screen for domestic violence and when identified, to determine whether mediation is appropriate.~~ Screening and assessment for domestic violence should not be the sole is a responsibility ~~of the mediator, but one that is~~ shared by all partners in the mediation process, including the Program staff, the mediator, lawyers representing the parties, and the court when making a referral.
- B. Domestic Violence occurs when one partner in an intimate relationship controls or attempts to control the other through force, intimidation, threat of abuse, or actual abuse. ~~_[should we include statutory definition/cites, or "as further defined in applicable state law"?]_~~ Domestic violence itself should never be mediated.
- C. It is understood that there is an inherent imbalance of power in cases involving domestic violence. When this imbalance is sufficient to compromise a party's ability to make decisions and exercise self-determination, the Court should refrain from referring cases to the Program.
- D. A mediator shall not mediate a case referred from the Program which has been identified to include domestic violence without adequate training and experience.
- ~~E.~~ ~~E. [whether/how to incorporate language from Model standards, ie: "All mediators shall review and to their best ability comply with the Model Standards of Practice for Family and Divorce Mediation, particularly those sections concerning domestic violence. to the extent possible..."?] Standard X (include in its entirety, with/without modifications, restate or refer to, ie: and Standards II A(2), (A)(4-7), III (C), VII (C), VIII~~

II. Pre-Mediation Safeguards

- A. Upon referral to the Program, staff will review and assess all case-related information available for evidence of domestic violence.

- B. The assessment by Program staff may include a review of the court's civil and criminal database(s) and/or the family law court file(s) to determine the case history, whether or not each party is currently represented, and the existence of any civil Domestic Violence Prevention Act restraining order and/or criminal No Contact or No Harassment restraining orders. Collateral sources may also be contacted (examples include attorneys for the parties, social workers, referral sources, and probation officers).
- C. ~~[Every party, or Where the referral is from a source other than the court and neither party is represented,]~~ Unless both parties are represented,
Program staff shall also attempt to contact each party to screen for domestic violence and when identified, determine the nature and history of violence through a differential domestic violence assessment.
- ~~D.~~ D. A differential domestic violence assessment is necessary to determine the different levels and forms of abuse and how the nature of the abuse may have affected the relationship so that the mediators may deal with the family in the most appropriate manner. ~~[A sample of screening tools, or the screening questionnaire, is included in the Appendix ??]~~
- E. Factors to be considered may include but are not limited to the severity, frequency and type of violence (physical, emotional, sexual, economic), the impact of the abuse on the party (present level of fear or concern), and the party's perceived ability to communicate on an equal basis in mediation.
- F. The purpose of the screening and assessment is for the Program to determine whether or not mediation is a safe and appropriate alternative. This may involve referring each party to an advocate or attorney so they may fully consider the benefits and potential dangers of mediation, and consider all of their options in determining how to proceed with their case.
- G. If Program staff deems it appropriate to proceed with a referral, the assigned mediator shall be informed of the domestic violence history and background information obtained by staff.

- H. Once a referral has been made to a member of the panel, it shall be and remain within the mediator's discretion to decide whether or not the mediation should go forward. Mediators will need to make their own assessment of the case and of their individual preparedness including their ability to provide adequate safeguards for mediations where there has been any domestic violence identified. Mediators may refer a case back to the Program for re-assessment and are encouraged to consult with Program staff prior to proceeding with the mediation.
- I. The purpose of the mediator's screening and assessment is to evaluate a victim's ability to negotiate, the level of an abuser's denial, and any control issues. Considerations include whether each party:
 - i) can make a decision to enter mediation freely without coercion;
 - ii) can provide full disclosure during mediation without feeling afraid or endangered;
 - iii) is aware that she/he can withdraw from mediation at any time and do so without retribution;
 - iv) can recognize that the other party has rights and needs separate from her/his own;
 - v) recognized mediation outcomes are to be agreed upon voluntarily;
 - vi) neither party is cognitively or emotionally impaired;
 - vii) neither party lacks capacity due to alcohol or drugs.

HJ. Mediation should not occur in any situation where there are safety or significant control or intimidation issues. Examples include but are not limited to:

- i) Abusive party discounts their partner and refuses to acknowledge how his/her behavior affects the other party;
- ii) Either party continues to violate the mediation ground rules;
- iii) Abuse and/or control are central to the relationship to such an extent that the parties are unable to differentiate their interests;
- iv) A party fears retribution;
- v) Abuse is ongoing between mediation sessions;
- vi) Either client is carrying a weapon or attempts to mediate while drinking or using drugs;
- vii) Suicide fantasies or those of killing the victim or children;

III. Mediation Safeguards

- A. Program staff shall inform any party where domestic violence has been identified that he/she has a right to be accompanied by a support person or to request separate mediation modifications. The support person may not actively participate in the mediation except to act as emotional support

for the party. The presence of the support person does not waive the confidentiality of the mediation.

- B. If mediation is to proceed where domestic violence has been identified, process protections must be employed. Mediators should consider making modifications to standard mediation practice to safeguard the parties and attempt to balance power. Techniques designed to address the power imbalance and to afford those who have experienced domestic violence a safe environment in which to mediate may include:

- a) i) Use of appropriate location that provides security for all participants;
- ii) Use of separate entrances, different arrival and departure times (such that the victim leaves first), escorts to transportation;
- iii) Create ground rules (respectful and appropriate use of language and gestures, no interrupting, no touching of other person);
- iv) Choose the topic;
- v) Decide who will speak;
- vi) Control the length of time each party will speak;
- vii) Allow and time each person's response;
- viii) Determine which spouse may present a proposal to the other;
- ix) Present an interpretation of what the spouse said;
- x) End the discussion;
- xi) Write down the agreement;
- xii) Conducting separate sessions or frequent use of caucuses to allow mediator to give/get feedback on safety issues/concerns.

IV. Post Mediation Safeguards

A. While mediating, the mediator should be monitoring for signs of abuse and terminate the mediation when necessary. (Examples include: fearful body language, one party dominating the discussion, difficulty expressing needs, put downs, etc.)

B. When terminating a session, mediators should consider employing adequate safeguards.

APPENDIX

Selected Resources

Campbell, Jacquelyn C, Ph.D., R.N., *Danger Assessment* (2003)

Chance, Chester B., & Gerencser, Alison E., *Screening Family Mediation for Domestic Violence*, 70 Fla. Bar J. 54 (April 1996)

Dunnigan, Alana, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. Rev. 1031 (Winter 2003)

Firestone, Gregory, Hon. Raymond T. McNeal, & Hon. Hugh E. Starnes: *Case Study in Mediation: Mediating Judicial Policy: Successful Mediation of a Family Court Rule on Domestic Violence and Mediation*, 42 Fam. Ct. Rev. 128 (Jan. 2004)

Gerencser, Alison E., *Family Mediation: Screening for Domestic Abuse*, 23 Fla. St. U. L. Rev. 43 (Summer 1995)

Model Code on Domestic & Family Violence, Section 407, National Council of Juvenile and Family Court Judges, Family Violence Department (FVD), (1994)

Model Standards of Practice for Family and Divorce Mediation, Developed by the Symposium on Standards of Practice, August 2000 (ABA, SPIDR, AFCC, AFM)

New York State Unified Court System, Division of Court Operations, Office of ADR Programs, *Family court Custody and Visitation Mediation Domestic Violence Screening Tool* (2003)

Rimelspach, Rene, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, featured article on www.mediate.com (2001)

Utzig, Kara C., *Entering the Debate on Spousal Abuse Divorce Mediation: Safely Managing Divorce Mediation When Domestic Violence is Discovered*, 7 CIRCLES Bu. W. J.L. & Soc. Pol 51 (Spring 1999)

Ver Steegh, Nancy, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 Wm. & Mary J. of Women & L. 145 (Winter 2003).

Waits, Kathleen, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 Alb. L. Rev. 1027 (Spring 1995)

Zylstra, Alexandria, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. Disp. Resol. 253